

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROBERT D. O'CONNOR	:	DETERMINATION
	:	DTA NO. 808868
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1975 and 1976.	:	

Petitioner, Robert D. O'Connor, 150-A Glenridge Road, Scotia, New York 12302, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1975 and 1976.

A hearing was held at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on December 18, 1991 at 9:15 A.M. Petitioner appeared by E. Guy Roemer, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq. of counsel). Petitioner submitted a brief on September 25, 1992. The Division of Taxation submitted its brief on October 6, 1992. Petitioner submitted a reply brief on November 3, 1992.

ISSUES

I. Whether the Division of Tax Appeals has jurisdiction to resolve a dispute between petitioner and the Division of Taxation regarding the alleged payment of an amount of tax admittedly due from petitioner.

II. If so, whether petitioner did, in fact, tender payment of the amount of personal income tax acknowledged by him to be due for the tax years 1975 and 1976.

FINDINGS OF FACT

Petitioner, Robert D. O'Connor, filed New York State personal income tax returns for the 1975 and 1976 tax years but did not submit payments for the amount of tax shown to be due on such returns. The correctness of the amount of tax shown to be due on the returns is not

disputed by either party.

As a result of his failure to pay the amounts shown to be due on his 1975 and 1976 returns, warrants were docketed against petitioner and his wife, Betsy O'Connor, in the Nassau County Clerk's office on December 21, 1976 in the amount of \$11,068.67 and on July 31, 1978 in the amount of \$12,085.98.

When petitioner sought to sell his home located at 146 Trinity Place, West Hempstead, he was advised that the warrants would have to be satisfied in order for the sale of his home to occur. The attorney representing petitioner in the sale of his home was advised by a Tax Compliance Agent in the Division of Taxation's ("Division") Mineola office that the sum of \$23,073.48 should be delivered to the individual representing the title company at the closing on the sale of petitioner's home, that the title company should then deliver such sum to the Division's Mineola office and that a satisfaction would then be issued for the two warrants at issue.

Petitioner sold the Trinity Place property on June 8, 1979 and endorsed over to the order of the New York State Tax Commission five checks totalling \$23,073.48. These five checks were entrusted to the custody of Al Gorman, a representative of American Title Company, for delivery to the Division to satisfy the two outstanding warrants.

Petitioner called as a witness Patricia Hutton, who was the bookkeeper and cashier for the American Title Company on June 8, 1979. She testified that she had spoken to an individual named John Schipisch at the Mineola office of the Division to verify the amount owed by Mr. O'Connor pursuant to the warrants. Ms. Hutton testified that she received the five checks from Mr. Gorman and handed them in an envelope with the notations "State Tax Commission" and "John Schipisch" written on the outside to Albert Vispoli, the manager of the office, for hand delivery to the Division's Mineola office.

Petitioner called as a witness Albert A. Vispoli, who was the manager of the American Title Company office at the time in question. Mr. Vispoli testified that he received the envelope in question from Ms. Hutton and delivered it as requested to the Division's office. He testified

that he handed the envelope to the receptionist but he did not know her name and did not obtain a receipt for the checks from her.

The Division introduced into the record internal memoranda which indicate that John Schipisch was not officially assigned to the Mineola office as manager of Tax Compliance until October 1, 1981, that Leonard Salis was the manager of the Mineola office in June of 1979 and that John Schipisch was manager of the Bronx office in June of 1979.

Subsequent to the closing, petitioner moved to Pennsylvania. Upon his return to New York State in November of 1984, petitioner became aware that the two warrants at issue had never been satisfied and that the Division was continuing in its efforts to collect on them. Petitioner, through his attorneys, attempted to convince the Division that he had already paid the amount of tax due in June of 1979. The Division indicated that it had no record of such payments. Petitioner next filed a Form IT-113X (Claim for Credit or Refund of Personal Income Tax) dated May 15, 1990 and received by the Division on June 1, 1990 in an effort to have the payments in question credited to his account. By a letter dated June 25, 1990, the Division denied petitioner's claim. The Division's letter also indicated that if petitioner disagreed with the denial of his claim, he could request a conciliation conference with the Bureau of Conciliation and Mediation Services or petition for a hearing with the Division of Tax Appeals within two years of the date of the letter.

Petitioner then filed a petition dated October 26, 1990 and received by the Division of Tax Appeals on October 31, 1990 seeking review of the denial of his claim for credit for the amount of taxes asserted to have been already paid.

Four of the five checks in question were clearly never cashed by the Division. The New York State Comptroller's Bureau of Unclaimed Funds determined that the funds from the four uncashed checks (in the aggregate amount of \$16,273.58) had eventually escheated to the State of New York. After petitioner was able to establish entitlement to the funds, the State Comptroller's office transferred the funds to the Division in partial payment of petitioner's tax liability. The fifth check remains unaccounted for to date. However, it is reasonable to infer

that its fate was the same as the other four.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner asserts that he has proven that the checks in question were delivered to the offices of the Division and that the Division lost the checks and thus never properly credited petitioner with the payments that he made. Petitioner asserts that the Division's jurisdictional objections are unfounded inasmuch as "the 'credit' being sought is the demand that the Tax Dept., 'credit' Robert O'Connor's account for payments actually made, in the face of the Tax Dept's refusal to do so." In addition, petitioner asserts that since Division personnel advised petitioner to file a petition for hearing, the Division is now estopped from denying jurisdiction.

The Division asserts that the Division of Tax Appeals has no jurisdiction to hear this matter inasmuch as petitioner's Claim for Credit or Refund of Personal Income Tax was filed beyond the applicable statute of limitations and inasmuch as a Claim for Credit or Refund of Personal Income Tax is not the appropriate vehicle to contest a disputed claim of payment of tax due when the amount of tax due has been self assessed by the taxpayer and is not being contested by the parties. In addition, the Division asserts that petitioner has failed to meet his burden of proof that payment in full was in fact tendered to the Division on June 8, 1979.

CONCLUSIONS OF LAW

A. Section 2006(4) of the Tax Law requires the Tax Appeals Tribunal:

"[t]o provide a hearing as a matter of right, to any petitioner upon such petitioner's request, pursuant to such rules, regulations, forms and instructions as the tribunal may prescribe, unless a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter."

Article 22 of the Tax Law which imposes the State personal income tax contains provisions which provide for, modify or deny the right to a hearing with respect to personal income tax (see, Matter of Dreisinger, Tax Appeals Tribunal, July 20, 1989). Accordingly, we must look to the provisions of Article 22 of the Tax Law to determine petitioner's right to a hearing.

Section 689(b) of the Tax Law specifically grants to taxpayers the right to petition for a redetermination of a deficiency without first having to pay the amount of tax in dispute. The

amount asserted due does not become assessed until the taxpayer has exhausted his appeal rights.

Section 682(a) of the Tax Law provides, in part, that:

"[t]he amount of tax which a return shows to be due, or the amount of tax which a return would have shown to be due but for a mathematical error, shall be deemed to be assessed on the date of filing of the return (including any amended return showing an increase of tax)."

Thus, when a taxpayer files a return (as did petitioner in the instant matter), he is self-assessing the amount of tax shown to be due on his return. The Division is not required to issue a Notice of Deficiency since the tax is already assessed and may instead proceed directly to the issuance of a Notice and Demand (Tax Law § 692[b]) and issuance of warrants (Tax Law § 692[c]). The taxpayer has no right to a hearing under such circumstances.

While petitioner argues that he is entitled to a hearing to determine whether he should be "credited" with the payments he asserts that he has made, Article 22 gives him no such rights. Rather, Tax Law § 689 allows taxpayers to petition for a hearing only for redetermination of a Notice of Deficiency (subsection [b]) or for a refund (subsection [c]). Moreover Tax Law § 687(a) requires that a claim for credit or refund must be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever period expires later. If petitioner filed his 1975 and 1976 returns in 1976 and 1977, respectively, and if, as petitioner asserts, he made payment on June 8, 1979, then the time to make such a claim has long since passed. Pursuant to Tax Law § 689(c)(1), a taxpayer may not petition for a refund if he has not made a timely claim for refund under Tax Law § 687(a).

Petitioner is not without a remedy in this matter. However, petitioner is required to first pay the amount asserted to be due by the Division, next, file a timely claim for a refund with the Division and then if the claim for refund is denied, file a timely petition for a review of the denial of the claim for refund. Thus, the instant petition is premature.

B. Petitioner asserts that the Division should be estopped from contesting the jurisdiction of the Division of Tax Appeals to hear this matter in light of its letter of June 25, 1990 to petitioner (see, Finding of Fact "8").

Generally, the doctrine of estoppel does not apply to government acts unless there are exceptional facts which require the application of the doctrine in order to avoid a manifest injustice (Matter of Harry's Exxon Service Station, Tax Appeals Tribunal, December 6, 1988). In that case, the Tribunal utilized a three-pronged test: (1) was there a right to rely on the representation; (2) was there in fact such reliance; and (3) was the reliance to the detriment of the party who relied upon the representation (see also, Matter of Bolkema Fuel Co., Tax Appeals Tribunal, March 19, 1992).

In the instant case, petitioner has not relied on the advice given to him in the Division's letter of June 25, 1990 to his detriment and has suffered no prejudice in having done so which would warrant the relief sought. At worst, petitioner has prematurely petitioned for a hearing. Accordingly, I must reject petitioner's estoppel argument.

C. The petition of Robert D. O'Connor is dismissed.

DATED: Troy, New York
July 29, 1993

/s/ Andrew F. Marchese
ADMINISTRATIVE LAW JUDGE